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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURLEY KING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

The appellant, Curley King, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on August 24, 1966 [C. T. 2]. 1/ The indictment was brought under Title 18, United States Code, Section 2113(a), Section 2, and Section 4. The indictment charged appellant Curley King with misprision of felony on April 29, 1966, and aiding and abetting a bank robbery on June 22, 1966.

1/ C. T. refers to Clerk's Transcript of Record.

Appellant pleaded not guilty to the indictment and after executing a waiver of trial by jury the case proceeded to trial before Judge A. Andrew Hauk [C. T. 7]. On October 20, 1966, appellant was found guilty of misprision of felony and acquitted of bank robbery [C. T. 9]. Thereafter appellant's notice of appeal was timely filed on November 14, 1966 [C. T. 13].

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 2113(a), 2, 4, 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 18, United States Code, Section 4 provides as follows:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both."

III

QUESTIONS PRESENTED

A. Was the evidence sufficient to sustain the judgment?

B. Is 18 U. S. C. §4 an unconstitutional impairment of a defendant's Fifth Amendment privilege against self-incrimination because it requires him to report his knowledge of the actual commission of a felony cognizable by a court of the United States to some judge or other person in civil or military authority under the United States?

IV

STATEMENT OF THE FACTS

On April 28, 1966, in an apartment in Los Angeles, a conversation took place between appellant, Curley King, his brother, Burley King, Jackie Dixon and Sharon Elizabeth Weston. The conversation related to the fact that Burley King wanted Sharon Weston to rob a bank.

On April 29, 1966, Sharon Weston carried out the plans of the previous day and robbed the Bank of America, Vermont and 30th Street Branch of $774 [R. T. 11, 22]. 2/ After the robbery Sharon entered a car containing Burley King and Jackie Dixon and made her getaway [R. T. 21]. Thereafter, the trio arrived at

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2/ R. T. refers to Reporter's Transcript.

apartment 203 located at 1008 West 24th Street [R. T. 22]. During a meeting attended by Sharon, Jackie and Burley King appellant heard about the robbery over the radio. Burley King then gave appellant some of the stolen bank funds [R. T. 24]. Arrangements were made to have Sharon Weston and Jackie Dixon driven to the apartment of a friend, Pat Hood, so that they could be transported to San Francisco "until things cooled off" [R. T. 23, 113, 122].

Later that same day appellant drove Sharon Weston and Jackie Dixon over to Pat Hood's apartment [R. T. 113]. That evening Sharon and Jackie left Los Angeles for San Francisco [R. T. 25, 113].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION.

1. Receipt of Stolen Monies With Knowledge of the Source is an Affirmative Act of Concealment of the Crime of the Principal.

Appellant argues that the Government failed to prove one of the essential elements of the crime of misprision of felony, that appellant took some affirmative step to conceal the bank robbery committed by Burley James King (appellant's brother), Sharon Weston and Jackie Dixon. The transcript discloses that appellant

took the following steps to conceal the crime of the principals; he received and concealed part of the stolen bank funds, and, after arrangements had been made to transport Sharon Weston and Jackie Dixon to San Francisco, he drove the two girls to Pat Hood's apartment.

Appellant cited Lancey v. United States, 356 F. 2d 407 (9th Cir. 1966) for the proposition that appellant's act of receiving some of the stolen bank funds does not constitute an affirmative act of concealment. The basis for this argument is that in the Lancey case, supra, at footnote 2, pg. 411, the Court indicates that Lancey received some money from the principal and this act was not listed by the Court as an affirmative act of concealment. Appellant, therefore, argues that the omission of Lancey's receipt of monies from the principal "would seem to be indicative of the fact that mere receiving of the monies from the bank robbery, without more, is not enough of an act of concealment to be cognizable under the statute." Appellant's Brief, p. 9, lines 7-10. However, a careful reading of footnote 2 fails to substantiate appellant's argument.

In summarizing the chronology of events in the Lancey case the Court notes in Footnote 2 on page 411 that, "He admitted Zavada had paid him $100, gave him five $20 bills 'to pay for some rent,' but claimed he paid Zavada back." Thus, it is apparent that in the Lancey case the record, unlike the record in the case at bar, failed to establish that Lancey had received stolen bank funds from the principal knowing that the funds had been stolen. The best that can be gleaned from Footnote 2 is that Lancey received

some money from the principal and that he paid the principal back. The all important fact of the source of the money paid to Lancey and his knowledge of the source was never proved. In the case at bar, however, there is direct testimony from Sharon Weston that appellant did in fact receive some of the stolen bank funds well knowing that he was participating in the fruits of the robbery [R. T. 24].

It is also worth noting that in Footnote 1 the Court in Lancey does touch upon whether an affirmative step of concealment could be made out by proving that a defendant conceals part of the stolen monies but the Court goes on to state that in Neal v. United States, 102 F. 2d 643 (8th Cir. 1939), this type of an affirmative act was never proved. The Government would now urge this Court to hold that an affirmative step to conceal the crime of the principal is established where the Government proves that the defendant has received stolen monies knowing that the funds have been stolen.

2. Judging the Evidence in the Light Most Favorable to the Government the Record Sustains the Finding That Appellant Drove Sharon Weston and Jackie Dixon to the Apartment of Pat Hood Subsequent to the Robbery.

F. B. I. Agent Lenehan testified during his direct examination that appellant had stated to him that subsequent to the robbery on April 29th and after arrangements had been made to transport Sharon Weston and Jackie Dixon to San Francisco, appellant drove

the two girls to the apartment of Pat Hood [R. T. 113]. Then on cross-examination Agent Lenehan reaffirmed that it was his impression that appellant had stated that he had driven the girls over to Pat Hood's apartment but that "it could be correct or it could be incorrect" because to him the act was not material.

In determining whether Agent Lenehan's testimony supports the finding that appellant did in fact drive the two girls to Pat Hood's apartment the Court must not only carefully review his testimony but must also examine the record as a whole and then judge all of the evidence in the light most favorable to the Government. When ruling on appellant's motion for judgment of acquittal the trial judge, taking into consideration the entire record, found that:

> "I can't help but find . . . that there was full knowledge of the crime; that there was full knowledge of the flight after the crime; that Curley King having heard all these things on the radio and knowing all these things, drove the two girls over to Pat's house so that they could go to San Francisco. Sharon Weston says it. Curley says it. And I prefer to believe that the F. B. I. man told the truth in what Curley told him.
>
> "When I join that together with what Sharon said, that they were driven over that night to Pat's house and then they went to San Francisco, and the context of Curley's statement, that arrangements had been made to go to San Francisco, it is such

that I can't believe but . . . and to go with Pat's friend . . . that the only reason that he had for driving the two girls over to Pat's house was to get together with Pat's friend so that they could go to San Francisco until the thing cooled off." [R. T. 173].

Finally, in reference to the quality of the act necessary to sustain the required concealment this Court in Lancey, supra, at p. 410, has stated that, "A harboring of the criminal, with full knowledge, may be the positive act required to constitute the required concealment."

B. THE REQUIREMENTS OF 18 U.S.C. SECTION 4 ARE IN NO WAY VIOLATIVE OF APPELLANT'S FIFTH AMENDMENT RIGHTS.

Appellant argues that the requirement in Section 4 that he make known his knowledge of the commission of a crime cognizable by a Court of the United States is a violation of his Fifth Amendment rights against self-incrimination. Appellant goes on to say that if he had reported the crime of the principals after he had received the stolen bank funds he could have been prosecuted as an accessory after the fact under 18 U.S.C. Section 3.

However, the real question to be answered is -- was there a point in time when appellant could have made known the crime of the principals without incriminating himself in any way? The

answer to this question would seem to be that prior to appellant's receipt of the stolen monies from the principal he first learned of the principal's crime over the radio and at that point he was free to communicate this information to the authorities without any fear of incriminating himself in any way.

In two recent cases dealing with the Fifth Amendment the Supreme Court has amplified its views on the scope of the Amendment. Marchetti v. United States, and Grosso v. United States slip sheet opinion, January 29, 1968. In both of these cases involving the Federal Wagering Tax Statutes the Supreme Court held that it was a violation of a defendant's Fifth Amendment rights to make him register with federal authorities and give information regarding his own activities which were tantamount to a violation of state law. The registration requirements which were struck down related to the compulsion to report one's own illegal activities, not as in the case at bar, the activities of another. The Supreme Court pinpointed the crucial question when it stated at page 12 of the slip sheet opinion, "The question is not whether petitioner holds a 'right' to violate state laws, but whether, having done so, he may be compelled to give evidence against himself." In the case at bar appellant had the opportunity, prior to any violation of the law by himself to report the crime of the principals: had he done so he would not have incriminated himself in any way.

CONCLUSION

For the above reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN